

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO'S 46, 47, 50, 52 & 54 OF 2018 (CONSOLIDATED)

BETWEEN

MAHAN LIMITED.....1ST APPLICANT

DECOTEC ENTERPRISES LTD.....2ND APPLICANT

JIANGXI YOUSE CONSTRUCTION LTD.....3RD APPLICANT

CEABUD ENGINEERING SERVICES LTD.....4TH APPLICANT

AND

KENYA RURAL ROADS AUTHORITY.....PROCURING ENTITY

Review in the matter of Tender No. RWC 484 for the upgrading to Bitumen Standards and Maintenance of Sosera-Ekora- Ramas- Kiomiti Road; Tender No.RWC 485 for the upgrading to Bitumen Standards and Maintenance of Kemora -Kiendege- Eberege-Gichuba - Kiambu Road; Tender No. RWC 441 for the upgrading to Bitumen Standards and Maintenance of Kamagambo-Mogonga (Phase II) - Nyasembe-Kenyanya Road; Tender RWC 408 for the upgrading to Bitumen standard and maintenance of Riosiri-Moi University (Rongo Campus) - Toku Bridge & A1 Ranen - DB Homabay Road and Tender No. RWC 496 for the upgrading to Bitumen Standards and Maintenance of Masara-Sori Road.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mr. Hussein Were - Member
3. Mr. Nelson Orgut - Member

4. Eng. Weche Okubo - Member
5. Mr. Peter Bitu Ondieki, MBS - Member
6. Rosemary Gituma - Member

IN ATTENDANCE

PRESENT BY INVITATION

Applicants 46 and 47 of 2018 Mahan Limited

1. Daniel Odhiambo - Advocate
2. Kelly Malenya - Advocate
3. Mwangi Anthony - Advocate

Applicants 50 of 2018 Decotec Enterprises Limited

4. Vincent Anyona - Advocate
5. Paul Omollo - Director

Applicants 52 & 54 of 2018 Jiangxi Youse Construction & Ceabud Eng.

6. Roseline Odede - Advocate

Procuring Entity- Kenya Rural Roads Authority

7. Justine Rapando - Advocate
8. Boru A. Bagaja - Procurement
9. Dennis Mulinge - Procurement

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:-

The Applicants filed their separate Requests for Review on various dates seeking for extensions of time to enable the Procuring Entity complete the evaluation and the award processes in respect of the following road and other related works.

- a) **The tender for the upgrading to bitumen standard and maintenance of Sosera -Ekora-Ramas-Kiomiti Road.**
- b) **The tender for the upgrading to Bitumen Standard and maintenance of Kemora-Kiendege-Eberege-Gachuba-kiambu Road.**
- c) **The upgrading to Bitumen Standard and maintenance of Kamagambo-mogona phase II) Nyasembe-Kenyanya Road.**
- d) **The tender RWC 408 for the upgrading to Bitumen standard and maintenance of Riosiri-Moi University (Rongo Campus) - Toku Bridge & A1 Ranen - DB Homabay Road.**
- e) **The tender RWC 496 for the upgrading Bitumen Standard and maintenance of the Masara -Sori Road.**

Each of the four Applicants filed a separate application in respect of the procurement relevant to it owing to the fact that the tenders bear different numbers. Owing to the commonality of the facts surrounding the applications and the similarity of the responses and in order to save time all the advocates who appeared before the Board on 26th April, 2018 agreed to have all the applications consolidated and be heard together and also agreed that the Board delivers one decision in all the matters.

During the hearing of the consolidated Request for Review the 1st Applicant was represented by Mr. Daniel Odhiambo Advocate while the 2nd and 3rd and the 4th Applicants were represented by Mr. Vincent Anyona and M/s

Roseline Odede Advocates respectively. The Procuring Entity on the other hand was represented by Mr. Justine Rapando.

The Applicants cases as set out in the Request for Review, were similar save for the different tender numbers and description and the Procuring Entity's responses which also similar were as follows:-

It was the Applicants cases that the Applicants among other bidders tendered for the projects which were the subject matters of the respective applications and that they submitted their bids to the Procuring Entity for evaluation in the hope that the said exercise would be completed and awards made.

The Applicants further contended that the Procuring Entity opened the Tenders on or about February, 2017, and it was now over 100 days since the Tenders were opened.

The Applicants averred that it was aware of the provisions of Section 80(6) of the Public Procurement and Asset Disposal Act, 2015 (hereafter referred to as "the Act") requires evaluation of a tender be carried out within a maximum period of 30 days of tender opening and to date the tender has neither been evaluated nor awarded the to any bidder within the tender evaluation period of thirty (30) days.

The Applicants additionally stated that there was an existing breach of the duties imposed by the Act, Regulations, 2006 and the tender Document.

The Applicants further stated that there had been no communication on whether or not its bid was successful as provided in Section 87(1) and/or

87(3) of the Act, despite the fact that it submitted a competitive bid as provided in Section 86 (1)(a) of the Act, Regulation 50(3) and clauses 25.6 & 28.1 of the tender document.

The Applicants also stated that Article 227(1) of the Constitution of Kenya provides that the procurement process must that which is+ fair, equitable, transparent, competitive and cost-effective and it is being denied a reasonable expectation to secure an award of the Tender and the Applicant risks suffering loss and damage.

The Applicants averred that it was apprehensive that it would suffer loss and damage if no steps were taken to extend the tender period and further feared that its rights to a fair, equitable, transparent, competitive and cost-effective procurement system would suffer, sought extension of the validity of the tender period vide letter and by this Request for Review.

In response to the above contentions the Procuring Entity averred that it carried out this procurement process in accordance with the provisions of the Act and the relevant Regulations.

The Procuring Entity submitted that the Evaluation Committee was appointed on 1st March, 2017 and submitted its report on 20th April, 2017 with the opinion by the Head of Procurement unit provided on 9th May, 2017. However, the Accounting Officer on the advice of the Head of the Procurement Section referred the said report back to the Evaluation Committee for consideration of a fundamental issue that had an effect on the recommendation by the Evaluation Committee.

The Procuring Entity additionally stated that the Evaluation Committee considered the comments raised by the Accounting Officer and submitted to the Head of the Procurement Unit on 20th, February, 2018 for a professional opinion and onward transmission to the Accounting Officer.

The Procuring Entity further stated that on 30th June, 2017 when the evaluation process was on-going, the budget for the financial year 2016/2017 under which the project was being procured, lapsed.

The Procuring Entity finally stated that on 31st January, 2018, a reallocation was made under the 2017/2018 financial year budget to provide for funds for this project. The Procuring Entity avers that it is keen to conclude this tender within 21 days from the date hereof.

The Board has considered the law and the submissions made by the two parties to this Request for Review and finds that the Applicant's application was not seriously contested. The Procuring Entity infact admitted that there had been delay in completing the procurement process herein and gave the reasons for the delay.

The Board notes that there have been four previous applications of a similar nature which have been filed before it relating to the same circumstances and seeking for the same remedies namely applications no's 30, 32 33 and 35 all of 2018.

The Board considered the said applications and the circumstances giving rise to the delay which are similar to the case now before the Board and held that it has the jurisdiction to extend the time within which a Procuring Entity can complete a procurement process.

In holding as it did the Board relied on the High Court decision in the case of **Republic -vs- The Public Procurement Administrative Review Board, Transcend Media Group Ltd and Scanad Kenya Ltd (Nai HC JR Misc. Application No. 302 of 2016)** where the High Court held that the Board can give direction on how a Procuring Entity should proceed with a procurement process which has not been completed.

The Board finally notes as indicated above that there have been several applications which have already been filed but which were occasioned by the reasons set out above one of which was lack of availability of funds.

The Board further notes that while it has the discretion to extend the time for the completion of a procurement process, the delay in the making of the applications is a relevant consideration and it is not always automatic that all the Requests for Review will be successful.

A bidder who for example knows that the completion of a procurement process has delayed yet decides not to take any action or delays inordinately in taking any action risks having its application dismissed.

Such an Applicant(s) in addition to explaining the cause of the delay in the completion of the procurement process must also give a sufficient explanation in making an application for extension of time failing which the procurement process shall lapse by operation of law or an order be made for retendering.

Save for the above observations, the consolidated applications numbers 46, 47, 50, 52 and 54 are allowed in terms of the following orders:-

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015 the Board makes the following orders on this Request for Review.

- a) **The consolidated Requests for Review numbers 46, 47, 50, 52 and 54 in respect of the following tenders be and are hereby allowed and the Procuring Entity is granted an extension of Thirty (30) days from today's date to enable it complete the procurement process herein including the making of an award.**
- i) The tender for the upgrading to bitumen standard and maintenance of Sosera -Ekona-Ramas-Kiomiti Road.
 - ii) The tender for the upgrading to Bitumen Standard and maintenance of Kemera-eberege-Gachuba-keumbu Road.
 - iii) The upgrading to Bitumen Standard and maintenance of Kamagambo-mugonga phase II) Nyasembe-Kenyenya Road.
 - iv) The tender RWC 408 for the upgrading to Bitumen standard and maintenance of Riosiri-Moi University (Rongo Campus) - Toku Bridge & A1 Ranen - DB Homabay Road.
 - v) The tender RWC 496 for the upgrading Bitumen Standard and maintenance of the Masara -Sori Road.
- b) **The tender validity period of the subject tenders is extended by a further period of Forty Five (45) days to enable the Procuring Entity complete the process subject to any bidder's right to challenge the process.**

- c) The above orders shall only apply to the procurement processes which are the subject matter of this procurement process as more specifically set out in the body of this decision.
- d) Each party shall however bear its own costs of the Request for Review for the reason that the orders granted above are beneficial to all parties.

Dated at Nairobi on this 27th day of April, 2018.



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

